Petition

81-1850

Supreme Court, U.S.
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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FERNANDO KNYFF and PATRICIA KNYFF,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED.

1. Did the United States Army owe a duty of care to California motorists to maintain and retain control over soldiers, who had been drinking intoxicants in supervised barracks on an army base, who became drunk while under the supervision and control of the barracks supervisor, and to prevent such drunken soldiers from leaving the barracks to drive upon the California highways?

2. Did the United States Army breach a duty of care owing to the petitioners to police and supervise its officers and enlisted men in the availability and use of intoxicants on the army base, thereby presenting a foreseeable risk of harm to petitioners, who were lawfully using a California public road, under principles of negligence and/or the agency doctrine of *respondeat superior?*

3. Did the federal district court and the Court of Appeals misconstrue and misapply California law regarding duty of care and *respondeat superior* in ruling favorably on the government's motion for summary judgment?

4. In view of the divergence of the circuit courts in finding a duty of care under facts and state law similar to those in the instant case, should the Supreme Court reverse the Ninth Circuit judgment in order to ensure harmony of decision amongst the circuits?

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3. Did the federal district court and the Court of Appeals misconstrue and misapply California law regarding duty of care and *respondeat superior* in ruling favorably on the government's motion for summary judgment?

4. In view of the divergence of the circuit courts in finding a duty of care under facts and state law similar to those in the instant case, should the Supreme Court reverse the Ninth Circuit judgment in order to ensure harmony of decision amongst the circuits?

Petitioners, Fernando Knyff and Patricia Knyff, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit rendered in this cause on January 5, 1982. The parties are the petitioners and the United States of America.[1]

OPINIONS BELOW.

The opinion of the United States District Court granting the summary judgment against petitioners was reduced to judgment on December 18, 1979. That

[1]identity of Parties per Rule 28.1

opinion is set forth in Appendix No. 1 to this petition. Petitioners prosecuted an appeal to the United States Court of Appeals for the Ninth Circuit on January 28, 1980. The Court of Appeals rendered its decision on appeal by a memorandum decision filed July 8, 1981. The memorandum decision is set forth in Appendix No. 2; petitioners timely filed a petition for rehearing and suggestion for rehearing en banc. By order of court, filed January 5, 1982, a rehearing was denied. That order is set forth in Appendix No. 3.

JURISDICTION.

The order and judgment of the District Court for the Northern District of California was dated, filed and entered on December 18, 1979. The judgment of the Court of Appeals, Ninth Circuit, was dated, filed and entered on July 8, 1981. The order and judgment of the Court of Appeals, Ninth Circuit, denying the petition for rehearing and rejecting the suggestion for rehearing en banc was dated, filed and entered on January 5, 1982. This petition for certiorari was filed within ninety days of January 5, 1982. This court's jurisdiction is invoked pursuant to Title 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

This action is maintained by petitioners under the Federal Tort Claims Act, and appropriate amendments thereto.

STATEMENT OF THE CASE.

A. Nature of the Case.

This is a suit in negligence maintained by petitioners under the Federal Tort Claims Act, 28 USC §§ 1346 (b), 2671 and 2401 (b).

On May 17, 1979, the petitioners filed this action for personal injuries against the United States of America and certain individual defendants under the Federal Tort Claims Act. The complaint was thereafter answered and the issues joined. The action is prosecuted by petitioners, Fernando Knyff and Patricia Knyff. The complaint is stated in seven causes of action wherein the essential claim is that petitioners sustained personal injuries in a vehicular collision that occurred while soldier, Marvin Lee Smith, was operating his vehicle on November 25, 1977, near Fort Ord, California.

On November 10, 1979, the United States filed and served a motion to dismiss the entire complaint of the petitioners or, alternatively, to grant a motion for summary judgment as to all causes of action. The government's motion as drawn was undifferentiated as to the consideration of the several causes of action. On December 14, 1979, the motion came on for hearing before the United States District Court. The motion for summary judgment was thereafter granted against petitioners and reduced to judgment on December 18, 1979. The petitioners filed a notice of appeal on January 28, 1980. That judgment has been affirmed by the Court of Appeals. Petition for rehearing was denied on January 5, 1982.

B. Statement of the Facts.

On Friday, November 25, 1977, MARVIN LEE SMITH (hereinafter "SMITH") was a member of the United States Armed Forces (infantry), stationed at Fort Ord Army Base, Fort Ord, California. [CR14;P.51-52]

SMITH was classified E-3 and assigned to the Second Battalion, Tenth Air Calvary Squadron, Troop B, at Fort Ord. [CR14;P.64:22-28] As of November 25, 1977, SMITH resided off base with his wife at 75 Nissen Road, Apartment No. 23, Salinas, California; he was the owner of a certain 1973 Mercury Marquis automobile, bearing California License No. 063 LCN. [CR14;P.49:3;P.61:2-3]

Prior to November 25, 1977, SMITH became acquainted and befriended one TIMOTHY A. RAY (hereinafter "RAY"). [CR14;P.105:13-26;P.106:1] Both SMITH and RAY were in the same reconaissance platoon at Fort Ord. (ibid). RAY had attended a Thanksgiving dinner at SMITH'S residence on November 24, 1977 at Salinas, California. [CR14;P.109:1-2]

By prior arrangement, RAY had planned a party or gathering for the afternoon and evening of November 25, 1977 at his billet located in the "Won Ton" barracks, assigned to Troop B, Second Battalion of the Tenth Air Calvary Squadron, stationed at Fort Ord. [CR14;P.63:206;P.115:1-5;P.123:5-6] No permission from the military authorities was required for the conduct of such a party or gathering. [CR14;P.134:6-7] The barracks were under continuous supervision of non-commissioned officers whose

duties were to enforce Army regulations and to engender military order and discipline and, further, to maintain the security of the barracks by logging, in and out, personnel entering and leaving the barracks. The party started between 4:30 and 5:00 p.m. on said date. Either six or seven enlisted men were present at the party. They partied while listening to music and consuming beer, wine, and hard liquor. [CR14;P.115:1-26;P.119:10-22] The alcoholic beverages consumed at the party had been purchased by the soldiers on base and were procured for this party. [CR14;P.119:10-22;P.146:3-15;P.66:5-6]

SMITH had been invited to RAY'S party, but remained at his residence in Salinas until approximately 4:00 p.m. on November 25, 1977. He then drove his car to the base with the intent of attending RAY'S party. [CR14;P.63:4-8] Upon SMITH'S entry onto the base compound, SMITH became subject to all military regulations with respect to the control of his actions while physically on the base. SMITH had consumed no alcoholic beverages nor eaten any food prior to his arrival at the base. [CR14;P.63:25-29;P.64:1-2] SMITH was early for the party, and upon his arrival at the base, SMITH stopped briefly at the base recreational facility to play basketball and "drink" before going to RAY's billet. [CR14;P.65:16-17]

SMITH arrived at RAY'S billet at between 6:00 and 6:30 p.m. He brought no alcoholic beverages to the party. [CR14;P.66:1-2;P.65:20-26] He had no money on his person with which to purchase any. [CR14;P.66:22-23] The party was in progress upon SMITH'S arrival. Hard liquor was present and being consumed at the time SMITH entered the party.

[CR14;P.66:4] It was common knowledge in the "Unit" that SMITH had no tolerance for the consumption of alcohol. [CR14;P.118:9-12] SMITH had acknowledged his own inability to handle liquor. [CR14;P.118:15-16;P.130:1-9] RAY and other members of the party encouraged SMITH to drink. [CR14;P.118:12-14]

At the party, SMITH like other participants, joined in the conversation and drank alcoholic beverages. [CR14;P.119:8-9;P.63:4-8] The fact that such conduct in the billet was violative of Army Regulations was known to both RAY and SMITH. [CR14;P.129:7-23]

After SMITH was at the party for approximately one hour, the store of alcoholic beverages ran low, and SMITH and RAY left the billet at about 8:30 p.m. and drove by SMITH'S vehicle to "Highway Liquors" located on Fremont Boulevard in Seaside, to purchase replacement beverages. [CR14;P.139:16-18;P.66:15-16] The liquor store is approximately ten minutes from the base by car. [CR14;P.119:23-26;P.120:1-15] While at the liquor store, SMITH and RAY jointly purchased a six-pack container of malt liquor and one-half pint of Seagram's gin. [CR14;P.120:17-20;P.69:1-2;P.70:10] While SMITH had no money, SMITH paid for the liquor with funds provided by RAY because RAY was not of legal age to make the purchase. [CR14;P.121:6;P.131:9-16;P 121:6-7]

After purchasing the alcoholic beverages, RAY and SMITH returned directly to the barracks. [CR14;P.121:25-26;P.121:17-22] SMITH drank none of the alcoholic beverages while en route from the liquor store back to the barracks. [CR14;P.121:13-

15] The cans and bottles as purchased remained sealed. [CR14;P.73:15-17] SMITH and RAY arrived at the base at about 8:45 p.m. and walked directly to the desk of the "CQ." The CQ is a non-commissioned officer of E-5 rank, known in military vernacular as charge of quarters. The CQ was on the ground floor of the barracks. [CR14;P.114-116] The CQ is to police entry of persons into the barracks and examine packages for beer, wine or hard liquor. [CR14;P.135:1-7;P.137:10-12] Because hard liquor is frequently secreted into the barracks, the CQ is charged with the responsibility of examining persons and their packages. [CR14;P.144:16-23] A Sergeant "Johnson" was the CQ on duty that evening and had taken his duty position at the Won Ton Barracks at approximately 4:00 p.m. [CR14;P.137:3-6] The CQ was to remain continuously on duty in the barracks until 8:00 a.m. the following day. [CR14;P.138:24-26]

When SMITH and RAY approached the CQ's desk, he acknowledged their presence. RAY advised the CQ that his bag only contained beer. [CR14;P.141:4-9] The CQ did not examine the grocery bag as was customarily done by other CQ's. [CR14;P.137:23-24] The CQ then verbally directed SMITH and RAY to go about their business. RAY had secreted the bottle of gin in his trousers and took it up to his billet. [CR14;P.137:23;P.141:10-11] [CR14;P.135:3-6]

The CQ is the representative of the commanding officer at Fort Ord. [CR12;P.35:12-13] The CQ is to check each billet on an hourly basis. [CR14; P.138:7] The CQ had not checked RAY'S billet prior to the return of RAY and SMITH from the liquor store in Seaside. [CR14;P.138:16-18] Upon their re-

turn to the barracks, RAY and SMITH consumed the malt liquor and gin they had purchased. The party was then still in progress. [CR14;P.122:1-25]

Some time later, the CQ came to RAY'S room, knocked on the door, and announced himself. [CR21; P.220:2-3] RAY and the other occupants were silent and refused to open the door for the CQ. [CR14; P.138:3] The CQ tried to open the door to RAY'S billet. It was locked, and the CQ knew it was locked. [CR14;P.145:11-16] The CQ neither asked to be admited entry to the billet nor determined that the occupants were drinking hard liquor. [CR14; P.142:21-23] While the CQ did not force the issue of entry into the billet, he admonished the occupants to turn down the loud music. [CR14;P.142:18-19] This directive was followed, and the CQ departed. [CR14;P. 138:12-15] RAY believes that the CQ knew that hard liquor was being consumed in the billet, for it was mandatory military procedure to allow the CQ entry to the billet once he had announced himself. [CR14; P.140:4-10;P.143:1;P.142:1-6] Had the CQ discovered hard liquor in the billet, he was required to report each of the participants for violation of Article 15 under the Uniform Rules of Military Justice. [CR14;P.144:5-7] Since this incident, the Army authority at Fort Ord has changed its billet policy and now requires that all billet doors remain open and unlocked during duty hours. [CR14;P.145:18-20]

It was the duty of the CQ to assure that hard liquor was not consumed on the premises. [CR14; P.124;1-7] Had the CQ discovered hard liquor in RAY'S billet, he would have directed them to dispose of it. [CR14;P.139:13-15] The CQ's customarily en-

force the regulation against hard liquor on the premises. [CR14;P.144:3]

It was the avowed policy of the military to promote "reasonable drinking" while on the base. [CR21; P.219:32] The regulations then in effect were Army Regulations No. 210-65, 210-3, AR-190-22, Sec.2-1, and applicable Fort Ord circulars. [CR17;P.159-161] It is enforcement of these very regulations which has been accelerated by the military authorities at Fort Ord since the accident on November 25, 1977. [CR14; P.145:2-3] One of the CQ's primary functions while on duty was to assure that no hard liquor was consumed in the barracks. [CR14;P.147:19-26]

SMITH remained at the party for approximately one hour after purchasing the alcoholic beverages in Seaside. RAY saw SMITH leave the barracks. [CR14; P.123:7-10] SMITH had asked RAY to go with him to obtain something to eat at or about the time of his intended departure. [CR14;P.123:15-17] RAY was too intoxicated to do so. SMITH was in fact intoxicated at the time he left the barracks. [CR21; P.220:6;P.78:14-18] The CQ on duty failed to observe SMITH depart the barracks or ignored his condition even though he knew SMITH was a member of Troop B, not a member of the barracks, and therefore lived off base. [CR21;P.219:5]

It was approximately 9:50 p.m. when SMITH drove off the base compound, entered onto State Highway One adjacent to the base and proceeded to travel in a southerly direction against northbound traffic, whereupon within minutes his vehicle struck a 1969 Volkswagen occupied by the petitioner, FERNANDO KNYFF. [CR21;P.220:6-7;P.88:1-11] SMITH has

no recollection as to where he went upon leaving the barracks, or how he gained entry onto State Highwas One travelling in the wrong direction. [CR14; P.77:25-26;P.79:17-18] SMITH's normal route home to Salinas would not have required his presence on State Highway One. [CR14;P.79:11-13] After the incident in question, SMITH next recalls regaining consciousness at Silas B. Hays Hospital on the base at Fort Ord on Saturday, November 26, 1977. [CR14;P.80:15-18] As a result of these factual events, the petitioners were severely injured. This suit thereafter ensued.

REASONS FOR GRANTING THE WRIT.

Petitioners have been deprived of their day in court in seeking damages for personal injuries inflicted upon them by the Army in breaching its duty to them by negligently failing to control one of its soldiers when it had the duty, means and opportunity to so control the soldier.

Petitioners are blameless victims struck down by a drunken soldier, driving the wrong way on a California public freeway dividing Fort Ord, who was, at all times relevant to the within action, subject to the authority, power, jurisdiction, control and discipline of the Army at Fort Ord.

FERNANDO KNYFF suffered severe, permanent, crippling and disabling injuries at the hands of the Army, and his wife, PATRICIA, suffered a miscarriage and severe emotional distress as a direct and proximate result thereof.

The Army promulgated regulations; (1) concerning drinking and driving on and off base; (2) con-

cerning drinking in unit barracks; and (3) concerning control of drinking in unit barracks by placing senior noncommissioned officers in charge of the living quarters. The Army negligently failed to enforce its own regulations.

The negligence of the Army, in the persons of the senior noncommissioned officer who was the Charge of Quarters on the evening in question, and the commanding general of Fort Ord, was the direct and proximate cause of the injuries and damage to FERNANDO AND PATRICIA KNYFF.

It is undisputed that the soldier, MARVIN LEE SMITH, while drunk, drove his automobile the wrong way on a California public freeway dividing Fort Ord and into the automobile driven by FERNANDO KNYFF, minutes after leaving his unit barracks on Fort Ord, the barracks in which he had become drunk. It is further undisputed that, at all times relevant to the within action, SMITH was subject to the authority, power, jurisdiction, control and discipline of the Army and its personnel at Fort Ord.

It is also undisputed that the Charge of Quarters, on the night in question herein, was acting within the course and scope of his employment and acting in line of duty, and that on the night in question Soldier Smith, immediately prior to the accident, was in his unit barracks and under the direct physical authority, power, jurisdiction, control and discipline of the Charge of Quarters. It is further undisputed that the said Charge of Quarters failed to prevent the drunken soldier from driving his automobile from the barracks.

The petitioners, FERNANDO and PATRICIA KNYFF, contend that, at all times relevant to the within action, the United States was responsible for the negligence of the Army, the commanding officer of Fort Ord, and the Charge of Quarters on the night in question, under the California doctrine of *respondeat superior.*

I.

The divergence of views between the Ninth Circuit and other circuits requires resolution and a stated substantive rule of Uniformity.

The Ninth Circuit has taken a most myopic and restrictive view of the duty of care to be exercised in the negligence context, not adopted by a majority of other federal jurisdictions, and reflecting views on duty of care at variance with the California substantive negligence law.[2] Given the gravity of the questions addressed by this petition, it is important for this Court to hear and decide the issues which require uniform treatment and disposition under the Federal Tort Claims Act. Such uniform application of State Law is fundamental under the Federal Tort Claims Act, and this Court should deem it necessary to consider and resolve such fundamental issues. The case of *Continental Illinois National Bank and Trust Co. v. Chicago R.I. & P. Co.* (1935) 294 US 648, 55 S Ct. 595, recognizes the fundamental duty of a court to speak to such issues. C.f., *Ira S. Bushey & Sons, Inc. v. U.S.* (1968) 398 F.2d 167.

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[2]None of the justices who heard and considered the matter on appeal was from the State of California.

II.

The United States owed a duty to the petitioners to prevent drunken soldiers at Fort Ord from Leaving that base to drive upon California's Public Highways.

A. California Law Determines the Existence of a Duty.

In California, as a general rule, no duty exists to control the actions of a third party, for the benefit of another, unless a special relationship exists between the defendant and the victim or the defendant and the wrongdoer. *Tarasoff v. Regents of the University of California*, 17 C.3d 425, 131 Cal. Rptr. 14 (1976); *Restatement 2d, Torts*, Section 315; Order, District Court, (CR 21; P.221, 3-8).

Certain special relationships, because of several hundred years of development in the law, are well accepted doctrines, e.g., principal-agent, master-servant, employer-employee. With few exceptions in the doctrine of principal-agent, the most recent of the three doctrines, the terms are treated as synonymous. 29 *Cal. Jur. 3d*, Employer and Employee.

Under unusual factual circumstances, not falling within traditional doctrines, special relationships are recognized by the law for good public policy reasons. See *Tarasoff*, supra.

Other exceptions to the general rule of non-liability stated in *Restatement 2d, Torts*, Section 315, are found in Sections 314A and Sections 316-319.

The California courts have adopted *Restatement 2d, Torts,* Sections 442-453, as the law of California, where the intervening negligence of a third party is involved. *Fish v. Los Angeles Dodgers Baseball Club,* 56 C.A.3d 620, 128 Cal. Rptr. 807 (1976), citing *McEvoy v. American Pool Corp.,* 32 C.2d 295, 195 P.2d 783; *Mosley v. Arden Farms* Co., 26 C.2d 213, 157 P.2d 372.

In particular, *Restatement 2d, Torts,* Section 447 has been adopted and cited with approval in *Fish,* supra, and in *Mann v. State of California,* 70 C.A. 3d 773, 139 Cal. Rptr. 82 (1977). *Restatement 2d, Torts,* Section 449 has been adopted and cited with approval in *Mann,* supra, and in *Bullis v. Security Pacific National Bank,* 21 C.3d 801, 148 Cal. Rptr. 22, (1978); *Tarasoff,* supra; *Meyser v. American Bldg. Maintenance, Inc.,* 85 C.A.3d 933, 149 Cal. Rptr. 808 (1978); *Levy-Zentner Co. v. Southern Pacific Transportation Co.,* 74 C.A.3d 762, 142 Cal. Rptr. 1, (1977). Other California cases citing with approval the relevant Restatement 2d sections have already been cited by petitioners in their brief below.

In addition, the California legislature, in its wisdom, has, by statute, created duties, the breach of which creates a presumption of negligence under *California Evidence Code,* Section 669, e.g., *California Business and Professions Code,* Section 25602. (Dram Shop Act, since abrogated by statute but deemed by the California Legislative Counsel as not retroactive so as to apply to the instant case)

Further, the United States Army and its installation at Fort Ord, California have promulgated regulations, rules and circulars with regard to the con-

sumption of alcohol which create a duty, the breach of which creates a presumption of negligence under *California Evidence Code,* Section 669. See *United Scottish Ins., Co. v United States,* (Ninth Circuit), 614 F.2d 188 (1979); *Blessing v. United States,* 447 F.Supp. 1160 (E.D.Pa. 1978).

California's law with respect to the concepts of negligence and duty is well illustrated in the case of *Weirum v. RKO General, Inc.* (1975) 15 C3d 40; 123 CR 468. There the court stated that while the question whether one owes a duty to another must be decided on a case by case basis, every case is governed by the rule of general application that all persons are required to use ordinary care to prevent others from being injured as a result of their conduct. The Court stated that foreseeability of the risk is a primary consideration in establishing the element of duty, citing *Dillon v. Legg* (1968), 68 C2d 728; 69 CR 72. The Court stated that while duty is a question of law, foreseeability is a question of fact.

The facts in the *Weirum* case are strikingly similar to the facts involved here. There, reckless conduct by youthful contestants, stimulated by defendant's broadcast, constituted a hazard to which the decedent was exposed. Here, drunken and reckless conduct by a soldier, stimulated by the defendant's allowance of reckless and irresponsible drinking in the supervised barracks, coupled with a failure to control the soldier, constituted the hazard to which the petitioners were exposed. In the *Weirum case the defendant,* relying upon the rule stated in Section 315 of the Restatement of Torts, 2d, urged that it owed no duty of care to the decedent. The Court rejected the rule

on the ground that misfeasance existed in that the defendant was responsible for making the plaintiff's position worse, i.e., defendant created a risk. Here, in this case, misfeasance of the same nature existed, i.e., the U.S. Army created a risk by allowing reckless and irresponsible drinking in the barracks and by shirking its responsibility to its drunken soldier and to the petitioners. Liability is not predicated upon the defendant's failure to intervene for the benefit of the petitioners but rather upon its creation of an unreasonable risk of harm to them. Further, if the negligence was one of nonfeasance, *respondeat superior* creates the special relationship under California law and the Restatement.

In addition, the Army, having assumed responsibility for soldiers' drinking in the barracks, pursuant to army regulations, should be held liable for the untoward foreseeable results of such drinking under the doctrine announced in *Indian Towing Company v. United States*, 350 U.S. 61; 100 L.Ed. 48; 76 S.Ct. 122.

Here, the Court of Appeals cited *Thompson vs. County of Alameda* (1980), 27 C3d 741, 614 P2d 728, and *Coulter vs. Superior Court*, (1978), 21 C3d 144, 577 P2d 669, in support of its affirmation of a judgment of the District Court. Petitioners respectfully submit that both cases are inapposite to the instant case.

The *Thompson* case turned on questions of statutory immunity and social policy as applied to the release of dangerous prisoners. The Court said that "each member of the general public who chances to

come into contact with a parolee bears the risk that the rehabilitative effort will fail . . . "

In the case of the drunken driver, the class of plaintiffs to whom the duty is owed is clearly discernible, i.e., the general driving public, pedestrians and others; in the case of released offenders and prisoners, the class of plaintiffs to whom the duty is owed is narrowed to those readily identified targets of the releasee's ire.

The "special relationship" between servicemen and the military has long been recognized as has the doctrine of *respondeat superior* in relation thereto. *Parker vs. United States,* 437 F. Supp. 1039 (1977); *O'Brien vs. United States,* 236 F.Supp. 792 (1964).

B. The Government Owed a Duty of Care to a Class of Persons of Which Petitioners were a Part.

1. *California Civil Code,* Section 1714, provides in pertinent part as follows:

> (a) Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person.

2. An indispensable condition of negligence liability is a duty of care owed by the alleged wrongdoer to the injured person or to a class of which he is a member. *Richards v. Stanley,* 43 C.2d 60, 271 P.2d 23; *McEvoy v. American Pool Corp.,* supra. Generally, a person owes a duty of care, in the sense of a potential liability for damages, to all persons who are foreseeably endangered by his

conduct, with respect to all risks which make the conduct unreasonably dangerous. *Dillon v. Legg*, supra. In the absence of overriding policy considerations, foreseeability of risk is of primary importance in establishing the element of duty. It is the risk reasonably within the range of apprehension, of injury to another person, that is taken into account in determining the existence of the duty to exercise care. *Richards v. Stanley*, supra; Also *Tarasoff v. Regents of the University of California*, supra. Here, no question arises that at all relevant times the Commanding General, Fort Ord, was acting in line of duty and in the course and scope of his employment. Likewise, no question arises that at all relevant times herein the CQ of Won Ton Barracks, whatever his identity, was acting in line of duty and in the course and scope of his employment. Petitioners assert that the Commanding General was negligent in properly supervising and training personnel within his command in the proper execution of the duties of CQ and in the exercise of responsibility in their consumption of alcoholic beverages. He was charged with the command responsibility of "continuous supervision and rigid enforcement" of Army policies concerning the consumption of alcoholic beverages. (CR 17; P. 178) In the case of Smith he very obviously failed or the unfortunate events leading to the petitioners' injuries never would have occurred. Where an Army base is situated near a civilian population center, it is wholly foreseeable that soldiers, having become drunk on-base in the barracks, would drive off of the base and become involved in automobile accidents due to their

drunkenness, *unless properly supervised and restrained.*

The CQ was charged with the proper supervision of the Won Ton Barracks on the evening of November 25, 1977. He negligently allowed Smith to become drunk in the barracks and to leave the barracks in a drunken state in dereliction of his duty to the Army and to petitioners. It was wholly foreseeable that Smith would drive onto the freeway and cause the injuries to petitioners, *unless properly supervised and restrained.* The CQ's lack of supervision should be considered negligence as a matter of law. He was a non-commissioned officer in the Army. He knew what he was doing but did not care. He was negligent and breached his duty to the petitioners. To state, as defendant does, that the CQ did not know Smith was drunk and did not know that he had left the barracks in a drunken condition, or to state that the CQ did not see Smith become drunk and did not see Smith leave the barracks in a drunken condition, begs the question.

III.

The Army was Negligent and Breached Its Duty of Due Care to Petitioners.

A. The Army negligently Furnished or Sold Intoxicants to Soldier Smith.

The Commanding General at Fort Ord knew: a. That Fort Ord adjoined a large civilian population center; b. That certain military personnel residing off-base would travel on California highways which

intersect and divide the base; c. That beer was available through vending machines on-base and that wine and hard liquor were available at the base Post Exchange and Commissary; d. That unless under 'continuous supervision," military personnel would become drunk on-base, either within or without the barracks; e. That unless Army regulations and Fort Ord regulations, rules and circulars were "rigidly enforced," military personnel would become drunk on-base, then drive off-base and become involved in automobile accidents on the public highways because of their drunkenness; f. That orientation lectures and meetings had been made mandatory concerning drinking and driving on the public highways. Yet the accident involved here occurred because the CQ had not been properly supervised and trained.

The CQ of Won Ton Barracks on the evening of November 25, 1977 knew: a. That he was charged with the overall supervision of the Won Ton Barracks from 4:00 P.M. on November 25, 1977 to 8:00 A.M. on November 26, 1977; b. That he was required to keep a log of all persons entering or leaving the barracks; c. That he was centered on the ground floor of the barracks in a position to observe all persons entering or leaving the barracks; d. That beer was, by Fort Ord regulations, rules and circulars, allowed in the barracks but that wine and hard liquor were not; e. That drunken soldiers were to be restrained and, if necessary, reported to his superiors; f. That Fort Ord regulations, rules and circulars concerning drinking and driving on the public highways had been disseminated to all military personnel and had been the subject of orientation lectures; g. That Smith was not a regular occupant of the barracks;

h. That Smith was a part of the group partying in Ray's room; i. That, because of loud music, he had knocked on the door to Ray's room and had been refused entrance; j. That Smith and Ray had obtained additional alcoholic beverages during the course of the party.

The CQ, in the exercise of due care and in the proper performance of his duties, should have known: a. That hard liquor, wine and beer were being consumed in Ray's room; b. That Smith was drunk; c. That Smith was in no condition to leave the barracks and drive an automobile; d. That Smith intended to leave the barracks while drunk; e. That Smith left the barracks to drive home while drunk; g. That in allowing the foregoing to occur, he was derelict in the performance of his duties and that Smith posed a threat to the safety of all motorists whether on-base or off-base.

B. Marvin Smith's Intervening Negligence did not Relieve the Government of Liability to Petitioners for Its Own Negligence.

1. The law in California with regard to the intervening acts of third persons is well settled. In the case of *Vesely v. Sager*, 5 C.3d 153, 95 Cal. Rptr. 623, it was held: "an actor may be liable if his negligence is a substantial factor in causing an injury, and he is not relieved of liability because of the intervening act of a third person if such act was reasonably foreseeable at the time of negligent conduct. (Citations) Moreover, 'If the likelihood that a third person may act in a particular manner is the hazard or one of the

hazards which makes th actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby.' (Rest.2d Torts, §449 . . .)" In this case petitioners' injuries were wholly foreseeable.

To say that the Army owes no duty to petitioners to control the drinking of soldiers in the barracks, given that all drinking soldiers in the barracks are to some extent "off-duty," is to say that the Army can, with impunity, allow drunken driving soldiers off the base to endanger the general driving public and pedestrians and no civil liability will follow. Such is not the law in California.

IV.

The United States is Vicariously Liable in Damages to Petitioners Under the Doctrine of Respondeat Superior.

A. The California Law of Respondeat Superior Applies.

The doctrine of *respondeat superior* is codified in California in Civil Code, Section 2338.

California has adopted the rationale that the employer's liability should extend beyond his actual or possible control over the employees to include risks inherent in or created by the enterprise because he, rather than the innocent injured party, is best able to spread the risk. It is grounded upon "a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may

fairly be said to be characteristic of its activities." *Ira S. Bushey & Sons, Inc. vs. United States*, 398 F.2d 167, 171, (1968), cited with approval in *Rodgers vs. Kemper Constr. Co.* (1975), 50 CA3d 608; 124 CR 143. In the *Bushey* case, a drunken Coast Guard seaman was returning to his vessel while it was in dry dock. He opened the dry dock's floodgate valves thereby causing the dry dock to sink and causing the seaman's vessel to slide off blocks and strike a wall causing damage for which suit was filed. The United States was held liable under the doctrine of *respondeat superior*. In the *Rodgers* case, the Court suggested that one way to determine whether a risk is inherent in, or created by, an enterprise is to ask whether the actual occurrence was a generally foreseeable consequence of the activtiy. The Court stated that "foreseeability" in this context must be distinguished from "foreseeability" as a test for negligence. It stated that, in the latter sense, "foreseeable" means a level of probability which would lead a prudent person to take effective precautions whereas "foreseeability" as a test for *respondeat superior* merely means that in the context of a particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business. In other words, where the question is one of vicarious liability, the inquiry should be whether the risk was one "that may fairly be regarded as typical of or broadly incidental" to the enterprise undertaken by the employer. The Court further stated that under the modern rationale for *respondeat superior*, the test for determining whether an employer is vicariously liable for the tortious conduct of his

employee is closely related to the test applied in workers' compensation cases for determining whether an injury arose out of, or in the course of employment. *Hinman vs. Westinghouse Elec. Co.*, (1970), 2 C3d 956; 88 CR 188.

The rationale of the *Rodgers* case has been followed in *Harris v. Trojan Fireworks Co.*, (1981) 120 CA 3d 157; *Spahn vs. Guild Industries Corp.*, (1979), 94 CA3d 143; 156 CR 375; and *Clark Equipment Co. vs. Wheat*, (1979), 92 CA3d 503; 154 CR 874.

B. The Army has Extensive Control Over Its Personnel and a Concomitant Responsibility.

Petitioners contend that, because the Army has a tighter control over its military personnel than the usual civilian employer, the Army has a concommitant heavier responsibility accordingly. Petitioners have already cited in their petition well-recognized authority that a soldier is on duty for certain purposes at all times during his enlistment. The discipline imposed in a military environment is well-known. The court is invited, however, to the oath of enlistment required by 10 U.S.C. 502 which includes the words "I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God."; 10 U.S.C. 803. Art. 3 Jurisdiction to try certain personnel; 10 U.S.C. 817. Art 17. Jurisdiction of courts' martial in general; 10 U.S.C. 809. Art. 9. Imposition of restraint.

CONCLUSION.

Based upon the foregoing material, petitioners respectfully pray that the writ of certiorari issue in this case.

Dated at San Jose, California this 22 day of March 1982.

Law Offices of Quentin H. Smith
by Roy E. Harper

(Appendices follow)

Appendix

Appendix 1

ORIGINAL
FILED
DEC 18 1979
CLERK, U.S. DIST. COURT
SAN FRANCISCO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FERNANDO KNYFF and PATRICIA KNYFF, *Plaintiffs,* v. UNITED STATES OF AMERICA, et al., *Defendants.*	NO. C-79-1170-WWS *ORDER*

FACTS

Plaintiffs filed suit under the Federal Tort Claims Act, 28 U.S.C. §2671, *et. seq.* and 28 U.S.C. §1346(b), alleging negligence on the part of the United States in connection with an auto accident in which plaintiffs were injured. On November 25, 1977, plaintiffs' vehicle was struck by an automobile owned and operated by Marvin Lee Smith, a member of the United States Army, stationed at Fort Ord. The facts most favorable to the plaintiffs show that Smith was off duty from November 24, 1977, until November 27, 1977. On November 25, 1977, Smith and several companions purchased wine, beer and hard liquor off the base and smuggled it into the barracks without the Charge of Quarters' (C.Q.) knowledge. Army regulations allow only the consumption of wine and beer in the barracks, and generally attempt to promote "re-

sponsible drinking" among the men. In making his rounds the C.Q. knocked on the door where the party with Smith was located and requested that the music be turned down. The men did not open the door, but complied with the C.Q.'s order. Although the C.Q. did not see him leave, Smith subsequently left the base in an intoxicated condition, and entered the freeway going the wrong direction, thereby colliding with the Knyffs' vehicle.

DISCUSSION

Plaintiffs assert claims against certain individual defendants. It is agreed that the Court lacks jurisdiction of those claims under the FTCA and they are therefore dismissed.

Plaintiffs claim that the United States is liable on a *respondeat superior* theory. The undisputed facts show that Smith was off duty at the time of the accident and not engaged in any activity related to his Army duties. Thus the accident cannot be found to have occurred in the course or scope of his employment.

Plaintiffs also claim that the United States is liable under *Coulter v. Superior Court*, 21 Cal. 3d 144, 145 Cal. Rptr. 534 (1978), but that case is inapplicable inasmuch as the United States did not furnish the alcoholic beverages. This claim must be dismissed.

Plaintiffs further contend that the United States was negligent in its supervision of its personnel while on the base and in the enforcement of Army regulations, thereby contributing to the accident. Plaintiffs' argument is without merit unless they can establish

a duty on the part of the Army owing to plaintiffs. The determination of the existence of a duty is a question of law, appropriately decided on a motion for summary judgment, *Weirum v. RKO General, Inc.*, 15 Cal. 3d 40, 123 Cal. Rptr. 468 (1975), and is governed by the law of California, where the accident occurred. *Richards v. United States*, 369 U.S. 1, 9 (1962).

No duty exists to control the actions of a third party unless a special relationship exists between the defendant and the victim or the defendant and the wrongdoer. *Restatement 2d of Torts* §315; *Tarasoff v. Regents of the University of California*, 17 Cal. 3d 425, 131 Cal. Rptr. 14 (1976). No special relationship exists here merely because Smith was a soldier in the United States Army.[1/] This case is easily distinguishable from situations where special relationships arose because of the inherent nature of the relationship between the parties. *Tarasoff v. Regents of the University of California, supra*, (Therapist and patient-wrongdoer); *Schwartz v. Helms Bakery Limited*, 67 Cal. 2d 232, 60 Cal. Rptr. 510 (1967) (Business and customer-victim); *Musgrove v. Ambrose Properties*, 87 Cal. App. 3d 44, 150 Cal. Rptr. 722 (1978) (Business and customer-victim); *Harland v. State*, 75 Cal. App. 3d 482, 142 Cal. Rptr. 201 (1977) (Veterans' Home and resident-wrongdoer); *Sanchez v. United States*, 506 F. 2d 702 (10th Cir. 1974) (Under analogous New Mexico law, no special relationship existed between Bureau of Indian Affairs and student attending Bureau school, who left school premises intoxicated, thereby causing traffic accident).

No special relationship can be predicated on the Army's attempt to control its personnel while on the

base through Army regulations and personal supervision. In the absence of a previous duty, one is liable for any action he undertakes only where it increases the risk of harm to the plaintiff, assumes a duty owed to the victim by the wrongdoer, or induces the victim to rely on the undertaking. *Restatement 2d of Torts* §324A; *Schwartz v. Helms Bakery Limited, supra,* 67 Cal. 2d 232; *Wright v. Arcade School District,* 230 Cal. App. 272, 40 Cal. Rptr. 812 (1964); *Morgan v. County of Yuba,* 230 Cal. App. 2d 938, 41 Cal. Rptr. 508 (1964). Since plaintiffs would have been in the same position if the Army had had no regulations or required no supervision of the barracks, they have failed to show that they were harmed by the Army's attempt to control Smith.

Policy considerations, applicable under California law, further demonstrate that this is not a proper case to impose a duty on the government to control the actions of its off duty personnel. *Beauchene v. Synanon Foundation, Inc.,* 88 Cal. App. 3d 346, 151 Cal. Rptr. 796 (1979); *Bartell v. Palos Verdes Peninsula School District,* 83 Cal. App. 3d 499, 147 Cal. Rptr. 898 (1978); *Wright v. Arcade School District, supra,* 230 Cal. App. 2d 272.

IT IS THEREFORE ORDERED that:

1. The complaint be dismissed as to the individual defendants; and

2. Defendant United States's motion for summary judgment is granted.

DATED: December 18, 1979

WILLIAM W. SCHWARZER
United States District Judge

Appendix 2

FILED
JUL 8 1981
RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FERNANDO KNYFF and PATRICIA KNYFF, *Appellants*, v. UNITED STATES OF AMERICA, et al., *Appellees.*	No. 80-4050 DC No. CV 79-1170 WWS MEMORANDUM

Appeal from the United States District Court
for the Northern District of California
William W. Schwarzer, District Judge, Presiding

Argued and submitted June 11, 1981

Before: BROWNING, ANDERSON, and SKOPIL,
Circuit Judges

The government's motion for summary judgment complied with the requirements of Fed.R.Civ.P. 56(e). Under California law *the government owed no duty* to appellants to control Smith's conduct. *See Thompson v. County of Alameda*, 27 Cal. 3d 741, 614 P. 2d 728 (1980); *Coulter v. Superior Court*, 21 Cal. 3d 144, 577 P. 2d 669 (1978). *The identity of the Charge of Quarters on the night of the accident is immaterial to the existence of such a duty.*

The judgment of the district court is AFFIRMED.

Appendix 3

FILED
JAN 05 1982
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FERNANDO KNYFF and PATRICIA KNYFF, *Appellants*, v. UNITED STATES OF AMERICA, et al., *Appellees.*	No. 80-4050 DC No. CV 79-1170 WWS ORDER

Appeal from the United States District Court
for the Northern District of California
William W. Schwarzer, District Judge, Presiding

Before: BROWNING, ANDERSON, and SKOPIL,
Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.